Supreme Court, U. S.
FILED
JAN 10 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, AND CYNTHIA KOONCE MILLER,

Appellants,

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, GOVERNOR; LOUIS L. GOLDSTEIN, COMPTROLLER; J. MILLARD TAWES, TREASURER; WESTERN MARYLAND COLLEGE; COLLEGE OF NOTRE DAME; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE; AND THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE OF THE CITY OF BALTIMORE, INC.,

Appellees.

ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM OF STATE APPELLEES

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Appellees, Board of Public Works of the State of Maryland and the Governor, Comptroller and Treasurer of Maryland, being the three individual members thereof, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the judgment of the three-judge District Court be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

OPINIONS BELOW

The majority and dissenting opinions of the three-judge District Court have not yet been reported and are reprinted at pages A-1 to A-25 and A-26 to A-34, respectively, in the Appendix to the Jurisdictional Statement. The Court's findings of fact, incorporated into the majority opinion, are reprinted at pages A-35 to A-51 of the Appendix.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Jurisdictional Statement.

QUESTIONS PRESENTED

1. Whether the lower court was correct in holding that Maryland's program of aid to higher education does not have the primary effect of advancing religion?

2. Whether the lower court was correct in holding that the relationship between church and state which results from Maryland's aid program is not entangling?

3. Whether plenary review of the decision below is warranted when the lower court, after extensive factual inquiry, scrupulously applied the applicable First Amendment principles frequently and recently enunciated in various decisions of this Court in upholding the Maryland aid program?

4. Whether this Court, in the event it now finds constitutional fault with the Maryland program, should order the appellee institutions to refund monies received by them in good faith prior and subsequent to the lower court's favorable decision?

STATUTES INVOLVED

The statutes involved are Maryland Annotated Code, Article 77A, §§ 65-69, as amended (the "Act"), reprinted

beginning at page A-52 of the Appendix to the Jurisdictional Statement.[1]

STATEMENT OF THE CASE

The Maryland Act sustained by the lower court provides for the payment of public funds to non-profit private colleges and universities in the State which meet the eligibility criteria set forth in Section 66 of Article 77A of the Maryland Annotated Code (A-52, A-53).[2] No aid to primary or secondary schools is involved here. Funds are paid in the form of annual non-categorical grant awards to each eligible institution. In order to be eligible to receive any award, an institution must maintain one or more earned degree programs, culminating in an associate of arts or bacculaureate degree. Institutions awarding only seminarian or theological degrees are not eligible to participate and several have been disqualified (A-47). The amounts of the annual awards to eligible institutions are based on full-time students enrolled during the preceding fiscal year and any full-time students enrolled in seminarian or theological academic programs must be excluded from the computation.[3] Article 77A, Section 67 (A-54, A-55).

While the Act does not limit the use of the funds to any particular type of expenditure (such as library construction, text books, transportation, or the like), Section 68A specific-

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[1] The portion of Chapter 716 of the Laws of Maryland of 1973 reprinted at page A-56 of the Appendix represents the version of Section 67 in effect from July 1, 1973 to July 1, 1974. Section 4 of Chapter 585 of the Laws of Maryland of 1974 sets forth a one-time award computation formula for fiscal year 1975. That one-time formula is neither reprinted in the Appendix to the Jurisdictional Statement nor set forth in an Appendix to this Motion to Affirm and is not material to the questions presented herein.

[2] "A" refers to the Appendix to the Jurisdictional Statement.

[3] Under earlier versions of the law, computations were based on degrees awarded, exclusive of any seminarian or theological degrees.

ally provides that "None of the monies payable under this subtitle shall be utilized by the institutions for sectarian purposes".[4] The State Board of Public Works and the Maryland Council for Higher Education are required to adopt criteria and procedures for its administration, including requirements for the submission of reports or data concerning the utilization of monies paid to the institutions. Article 77A, Section 68 (A-54). Pursuant to this statutory directive, the presidents of the institutions are first required to certify under oath[5] prior to receipt of any funds that such funds will not be expended for sectarian purposes and are then required to file a similar certificate a year later that the funds received have not been actually expended for sectarian purposes (A-48). The lower court found that:

> "The usage verification and the normal annual accounting which each college conducts obviate the need for post-audit analysis in every case. Such analysis is available when needed, however. State auditors could accomplish a post-audit analysis, using accepted accounting techniques, in one day or less. This mechanical accounting of State expenditures is not entangling . . . [and] is quick and non-judgmental" (A-48).

There is no time limit on the statutory prohibition of sectarian usage of funds and the lower court found "that the administering body clearly understands that sectarian usage is forbidden, no matter when it occurs" (A-49).

Section 69 of Article 77A contains severability provisions to the effect that if any portion of the Act or any particular

[4] This specific prohibition was added one year after the statute was first enacted and prior to the initiation of this case.

[5] Section 435 of Article 27 of the Maryland Annotated Code defines the offense of perjury as including "an oath or affirmation, if made willfully and falsely in any of the following cases . . .: . . . in all affidavits required by law to be taken; . . . all affidavits required to be made to reports and returns made to . . . any officer of the government . . .".

payments made thereunder are held to be unconstitutional or invalid for any reason, then neither the remaining portions of the Act, nor any other payments made thereunder, shall be deemed affected by such unconstitutionality or invalidity (A-54, A-55).

After an extensive factual inquiry into the operation and nature of the five appellee educational institutions, the lower court found that none are pervasively sectarian but that all are church-related and conform closely to the colleges approved in *Tilton v. Richardson*, 403 U.S. 672 (1971).[5a] The Maryland institutions were contrasted with the more strongly sectarian South Carolina college receiving aid under the statute upheld in *Hunt v. McNair*, 413 U.S. 734 (1973) (A-10, A-11).

The correctness of these "ultimate" conclusions and the care with which the lower court followed the analytical teachings of this Court as set forth in *Tilton* and *Hunt* are best evidenced by consideration of the following findings of fact, all of which are fully supported by the record:

> ". . . An aid program need not have the primary effect of advancing religion unless recipient institutions are so permeated by religion that the secular side cannot be separated from the sectarian. The defendants here are not in that pervasively sectarian category" (A-38).
>
> "Not only has there been no showing that religion slants the conduct of classes at the defendant institutions, this litigation has demonstrated the opposite to be true" (A-38).
>
> * * * * * *
>
> ". . . there is no actual college policy encouraging prayer in class. It is treated as a facet of the instructor's academic freedom. Moreover, plaintiffs failed to establish that beginning a class with prayer in any way diminishes the atmosphere of intellectual freedom which marks

[5a] By referring to and treating the colleges as a group, we do not mean to disagree with the position of Western Maryland College that it is not church-related.

these colleges . . . . It appears that prayer in class is as peripheral to the subject of religious permeation of an institution as are the facts that some instructors wear clerical garb, and some classrooms have religious symbols. None of these facts impairs the clear and convincing evidence that courses at each defendant are taught 'according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards.' *Tilton v. Richardson, supra,* 403 U.S. 681" (A-39, A-40).

* * * * * *

"Despite this variety of hiring situations, two things are common to each defendant. Hiring decisions are effectively low-level and participatory. And at no defendant was there such dominance on the faculty by one religious group that hiring bias would escape the attention of members of other religious groups. Even more importantly, the faculty members of each defendant, many of whom testified, impress the Court as professionals who value academic freedom and see no place for religious bias in liberal arts education . . ." (A-41).

"Though the above represents a finding as to faculty hiring generally, the hiring patterns for religion or theology departments are a special case and present a unique problem . . ." (A-41, A-42).

"**. . . although the Court finds that the extent of academic freedom at each defendant belies a finding that any of them are 'pervasively sectarian,' *Hunt v. McNair,* 41 USLW 5174, 5177 (June 25, 1973), the Court is unable to characterize the manner in which theology and religion courses are conducted. Those courses notwithstanding, the extent of academic freedom at each institution, coupled with the more intangible factors that determine an institution's 'atmosphere,' discussed below, lead to a conclusion that each defendant is 'characterized by an atmosphere of academic freedom rather than religious indoctrination,' *Tilton v. Richardson, supra,* 403 U.S. 681, and therefore that the primary effect of aid to these defendants is not to advance 'religion'"** (A-42, A-43).

"**. . . The record and testimony in this case amply support a finding that at none of the defendants is religious indoctrination a substantial purpose or activity . . .**" (A-43).

* * * * * *

"**. . . Representatives of each defendant candidly admitted that their institution is interested in encouraging spiritual interest . . . . [but] at none of these institutions does this encouragement go beyond providing the opportunities or occasions for religious experience**" (A-45).

* * * * * *

"**The Court has already stated its view that it is neither legally empowered nor genuinely able to characterize the manner in which theology and religion are studied at these schools . . .[6] However, the Court's findings as to the chaplaincy program and the religion or theology courses do not impair the general finding that religious indoctrination is not a substantial purpose or activity of any of these defendants**" (A-46).

In the first three years of the aid program's operation, the five appellee institutions have comprised slightly less than one-third of the eligible institutions receiving awards and have together received approximately that same fraction of the total funds awarded (A-37, n. 2). One of these five institutions, Saint Joseph College, has since ceased operation and will not receive further funds and another, Western Maryland College, vigorously urges that it is not properly characterized as church-related. Circuit Court Judge Bryan, in his dissent below, agreed with Western Maryland's contention (A-26, n. 2). No claim is made that other Maryland

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[6] Because of the possibility (rather than the fact or certainty) that religion and theology courses at the schools could be devoted to deepening religious experiences in a particular faith and in light of the perceived difficulty of either the court or the State making the necessary determination, the Court held that the State must take steps to "ensure that public funds are not used to support such [course] programs" (A-13). These steps are within the power of the administering agencies and are already being taken in connection with the payments made subsequent to the lower court's decision.

institutions receiving funds are either church-related or pervasively sectarian. In commenting on this balance between church-related and other institutions, the lower court noted that Maryland's program "does not primarily aid one particular religious group with a large educational establishment" (A-22).

Except for the first year's awards, which had been paid prior to the adoption of the explicit statutory prohibition against the use of funds for sectarian purposes and prior to the commencement of these proceedings, the awards made for the benefit of the appellee institutions based upon their undergraduate programs were held in escrow by the State of Maryland pending the decision of the lower court. Payments to two of the institutions based upon graduate level degrees were made in early 1974 in accordance with a 1973 amendment of the Act (A-56).[7] These graduate degree payments, as well as the more recent payments of the escrowed undergraduate awards, were made after the Appellants' requests for specific injunctive relief had been denied.

ARGUMENT

In upholding Maryland's aid program as applicable to church-related colleges, the lower court carefully adhered to the three part test established by this Court and found that the program has a secular legislative purpose, does not have the primary effect of advancing or inhibiting religion and does not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). Appellants concede the presence of a secular legislative purpose but argue that Maryland's statutory program contains at least the potential for having the primary effect of advancing religion and fostering excessive entanglement. Unless

[7] These institutions certified to the lower court that the monies would be used only for the graduate level programs (R. 1399, 1400).

this Court wishes to fully review every application by a lower court of its established criteria, and to do so in the context of potential rather than actual First Amendment problems in the field of higher education, then plenary review should not be granted here and the decision below should be summarily affirmed.

I.

THE MARYLAND ACT DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION.

In order to demonstrate that Maryland's aid program has the prohibited primary religious effect, Appellants must sustain their burden of proving either:

> (1) that aid monies flow to "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission". (*Hunt v. McNair*, 413 U.S. 734, 743 (1973)); or
>
> (2) that monies awarded under the program are funding "specifically religious activity in an otherwise substantially secular setting." *Ibid.*

A. *Institutions of Higher Education Must Be Viewed Differently Than Primary and Secondary Schools.*

This Court established in *Tilton v. Richardson*, 403 U.S. 672, 685 (1971) and reaffirmed in *Hunt v. McNair*, 413 U.S. 734 (1973) and *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 777 n. 32 (1973), the proposition that

> ". . . there are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools"

and that these differences must be given prominent consideration in determining the constitutionality of any program of aid to higher education. These critical differences were

initially detailed in Chief Justice Burger's plurality opinion in *Tilton v. Richardson* as follows:

> "The 'affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an early age.' . . . There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination . . . The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations. Furthermore, by their very nature, college and post-graduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Finally, many church-related colleges and universities seek to evoke free and critical responses from their students and are characterized by a high degree of academic freedom." 403 U.S. at 685-86.

Having found the four Catholic colleges involved in the *Tilton* case to be "institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education" (403 U.S. at 686-87), the Court concluded that:

> "Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened." 403 U.S. at 687.

B. *The Appellee Institutions Are Not Pervasively Sectarian.*

With regard to the first part of the primary effect test, the lower court compared the appellee institutions with the

colleges considered by this Court in *Tilton v. Richardson* and *Hunt v. McNair*, and found that none of them were "pervasively sectarian". The subsidiary findings of fact underlying this conclusion are amply supported by the trial record and demonstrate that the court below properly considered and applied the relevant criteria as established by this Court's recent decisions. It is equally apparent that those subsidiary findings of fact fully support the court's conclusion that none of the institutions are pervasively sectarian. The correctness of the lower court's holding in this regard is so clear as not to warrant further discussion.

C. *State Monies Are Not Used To Fund Specifically Religious Activities.*

The second part of the primary effect test comes into play in dealing with institutions which, while they are not pervasively sectarian, are church-related. Under this test it is necessary for the Appellants to show that the lower court erroneously held that State monies are not funding specifically religious activity in an otherwise secular setting.

There are two ways in which the burden of proving such a primary effect can be met. The first of these ways — showing that State funds in fact have been used to directly support specifically religious activity — is simply not available to Appellants here. The only State funds which were ever disbursed to and used by the appellee institutions were the 1971 awards paid prior to the adoption of the explicit statutory prohibition against the use of funds for sectarian purposes. Thus, even if the record below contained clear evidence of a specific prohibited use of *those* funds, that would have no bearing on the constitutionality of the *present* aid program. The finding of the lower court that three of the institutions commingled that first year's grant with general college operating funds (A-50) can hardly be used to strike

down the present statute, particularly in light of the fact that one of those institutions is now out of existence, the other is at best barely church-related and the third is clearly not pervasively sectarian.

The second way in which the funding of specifically religious activity can be shown is to demonstrate the absence of safeguards against such a funding. This requires far more than the speculation engaged in by the Appellants. The lower court, in declining to engage in this kind of speculation, referred to this Court's observation in *Tilton v. Richardson*, 403 U.S. at 679 (1971) that:

> "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement . . . But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional."

This judicial admonition against such speculation is, of course, entirely consistent with the holding in the *Tilton* case that the possibility of religious use of a governmentally financed structure after the expiration of the 20 year prohibition against such use was constitutionally unacceptable. While the actual religious use of such a building was indeed only a possibility, it was a certainty that the use restriction would cease to exist altogether in 20 years. Thus, it was the *combination* of the possibility of religious use with the certainty of the absence of any prohibition which was fatal to the durational limitation.

The prohibition in the Maryland Act against sectarian use of funds is permanent and without limit. The lower court found the administering body to be clearly aware of the fact that "sectarian use is forbidden, no matter when it occurs" (A-49). There is no substantive or constitutional distinction between Maryland's statutory prohibition and the similar

prohibitions involved in *Hunt* and *Tilton* (absent the 20 year limitation), and no reason why the one should be less effective than the others.

The holding below that there are sufficient safeguards in the Maryland aid program to insure that funds are not diverted to support religious activity was not grounded solely in the statutory prohibition. The court also pointed to the prohibition against support of seminarian or theological degree programs, to the two verifications of non-sectarian usage required each year of the presidents of the institutions and to the administrative authority to perform any necessary public audits (A-12). In addition, the court cited in its findings of fact the general knowledge of the programs and operation of all colleges and universities which the Maryland Council for Higher Education acquires as a result of its other duties, the Council's requirement of additional follow-up data, where necessary, in conjunction with the post-expenditure verification and the ability of the Council to adopt additional follow-up procedures pursuant to the statutory mandate to insure that any facilities aided by State grants are not later converted to sectarian usage.

To conclude that these safeguards are inadequate would require assumptions that the college presidents will either fail to understand what is meant by sectarian usage of funds or will periodically give false oaths,[8] that follow-up data will not be requested when necessary, that post-audit analysis and accounting review will not be conducted when warranted, and that the responsible State agencies will be generally lax in their enforcement of the prohibition. The lower court quite properly declined to engage in this sort of speculation, finding no basis in the record for doing so.

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[8] This Court said in *Board of Education v. Allen*, 392 U.S. 236, 245 (1964), "we cannot assume that school authorities . . . are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law."

The only qualification to the court's holding of an absence of a prohibited primary effect related to the teaching of the specific subjects of theology and religion at the appellee institutions. While the court did not find that the institutions' general atmosphere of academic freedom was not present in connection with the teaching of these particular courses, it was unable to find "*a clear indication* that theology was taught as an academic discipline" at these institutions (A-13, emphasis supplied). Accordingly, the State was directed to take steps to avoid the use of public funds to support such theology and religion programs (A-13). This judicial prohibition against the use of funds in such programs, under circumstances falling short of a finding of a lack of academic freedom in the area, reflects the extreme care exercised by the court in applying the applicable First Amendment principles. As indicated above, the State has already taken steps at the administrative level to comply with the lower court's order. The administering agency likewise possesses the authority and the awareness of its responsibilities to take any other similar action should actual experience under the Act indicate this to be necessary in order to effectuate the prohibition against sectarian usage. Indeed, the statute *requires* that it do so.

II.

THE MARYLAND ACT DOES NOT FOSTER AN EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION.

This Court has previously isolated three factors which enter into the analysis of whether excessive entanglement is present in a government aid program. They are "the character and purposes of the institutions that are aided, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority". *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971). A careful analysis of the *Lemon* decision and others involving primary

and secondary schools, together with consideration of this Court's decisions in the higher education cases (*Tilton v. Richardson, supra* and *Hunt v. McNair, supra*), makes it clear that the first of these factors — the character and purposes of the schools — is the decisive element in the entanglement analysis. As this Court observed in *Hunt v. McNair:*

> "The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement . . . varies in large measure with the extent to which religion permeates the institution." 413 U.S. at 746.

This lesson was not lost on the lower court here, which discussed the importance of the institutions' character and the relationship between that factor and the nature of the aid involved in the following terms:

> "What emerges from a consideration of these cases is the conviction that the ideological neutrality of a particular program of aid is dependent on the type of institution being benefited. The classroom buildings provided in *Tilton* and *Hunt* are no more neutral in the abstract than the class room buildings which were maintained with public funds in *Nyquist*. The classes taught in the *Tilton* and *Hunt* classrooms are no more neutral than the classes taught by publicly subsidized teachers in *Lemon*, all other things being equal. Obviously, all other things are not equal. What would be impermissible in an institution staffed by members of a particular faith, administratively controlled by a religious body, and dedicated to the inculcation of a particular faith, may well be permissible in an autonomous institution staffed by faculty hired on the basis of academic merit, where academic freedom prevails, and where courses are taught in accordance with the requirements of an academic discipline. The Court could validly require that the state monitor the content of teaching at the primary or secondary level to prevent even inadvertent lapses into religious indoctrination on the part of publicly subsidized teachers. Yet the Court could conclude

that such monitoring would not be necessary at a college which maintained its academic freedom and integrity" (A-15, A-16).

A comparison of the aid programs upheld in *Tilton* and *Hunt* with the present case reveals only a single distinction — the nature of the aid. In the two earlier cases, public funds were limited in their use to the construction of buildings, whereas here the aid program involves non-categorical grants which may be used for various non-sectarian purposes. It is respectfully submitted that the lower court was entirely correct in concluding that, in the context of this case, that distinction does not rise to constitutional dimensions.

In *Tilton* the grant monies involved were available for the construction of virtually any type of building, subject only to a prohibition against sectarian usage identical to the Maryland prohibition. Obviously a whole range of activities could occur in these buildings and the nature of the activities could vary from year to year. In essence, a single large construction grant would be used to finance a building which, while it may be devoted to entirely non-sectarian uses in its early years of operation, could conceivably be devoted to entirely different and perhaps sectarian uses in later years. This feature of the construction grant program obviously requires some continuing awareness on the part of the administering authorities, both of the continuing nature of the institution and of the various uses to which the buildings are devoted over an extended period of time. The necessity of maintaining this awareness in turn requires the administering authority to establish and continue a limited oversight relationship with the institutional aid recipient.

Appellants urge that the Maryland annual grant program should be sharply distinguished from the one-time construction grant involved in *Tilton v. Richardson*. But this ignores

the fact that, despite the one-time nature of a grant under the *Tilton* program, continuing governmental oversight of the use to which the completed facility is being put is required. The continuing expenditure oversight involved in annual grant programs offers no greater possibilities for entanglement than continuing use oversight.

Indeed, when one compares the entanglement possibilities of annual grants covering operating expense items with a single large grant or series of grants funding a facility which will be in use for years to come, one can perceive advantages to the former from both a primary effect and an entanglement perspective. In the case of an annual operating expense item, the funds are put to immediate and final use. Funds spent on 1974 operating expenses do not require any re-examination of the nature of the institution and its various programs in 1975, not to mention 20 years later. In facilities funding, every dollar spent carries with it a long-term sectarian use prohibition and the correlative long-term oversight relationship. When aid monies are spent on annual operating items, that same relationship may continue from year to year but the stakes are smaller since prior years' grants are no longer involved. In addition, if an institution's basic nature changes to pervasively sectarian, it can be ruled ineligible for further aid without having to worry about prior grants spent on permanent facilities. Obviously, in each type of program some kind of continuing awareness and relationship is necessary. But the mere fact that grants are made on an annual basis hardly increases the entanglement problems.

Despite the connotations of the phrase "religiously neutral facilities", a continuing awareness of the use to which a facility is put involves more than a knowledge of bricks and mortar alone. A class conducted in an institution of higher learning may take place in a classroom building, but

the sectarian or non-sectarian nature of that class (and, therefore, of the use of the building) obviously depends upon its professor, the course materials used, the manner in which the class is taught, and the overall character of the institution itself. Thus, to say that a class or classroom building is neutral and is put to a religiously neutral use necessarily requires some consideration or awareness of these non-physical matters.

In a primary or secondary school setting, where the students are younger and more impressionable and where one perceives, notwithstanding elements of academic discipline and freedom, a distinct or dominant purpose of the school to be the inculcation of particular religious values, it may indeed be impossible to satisfactorily monitor various types of aid programs without creating excessive entanglement. This Court's recent decisions in the primary and secondary education field have so indicated. See *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); and *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

But the lesson of *Tilton* and *Hunt*, properly learned and applied by the lower court here, is that the situation is vastly different in institutions of higher learning which are not pervasively sectarian and which are characterized by a high degree of academic freedom and integrity.

The court below found that the secular aspects of the appellee colleges can be readily separated from the sectarian and that these separate secular aspects or programs are the only beneficiaries of State aid (A-19).[9] Because of the essen-

[9] No difficulty whatsoever is presented by the lower court's prohibition of aid to the institutions' religion course programs. The courses and instructors involved in these programs are readily identifiable and separable from the remainder of the curriculum.

tially academic and secular character of the colleges and the ready separability of their limited sectarian programs, the court quite properly concluded that:

> ". . . There is no necessity for state officials to investigate the conduct of particular classes of educational programs to determine whether a school is attempting to indoctrinate its students under the guise of secular education" (A-18).

The fact that such periodic investigations, and the entanglement problems which they could create, are not necessary, does not suggest that the Maryland Council for Higher Education will be unaware either of the evolving nature of the institutions or of the particular uses to which State funds are put. As noted earlier, the Council has substantial current expertise as to the character and purposes of all of the State's institutions of higher education derived from its other responsibilities wholly unrelated to the aid program here in question. As a consequence, the Council would perceive any future changes in the basic character of the institutions as they occur. The various administrative procedures adopted by the Council, from the verifications under oath to the submission of necessary follow-up data, and the availability of post-expenditure audits where clearly necessary, insure that the State will know what programs have been funded or facilities built with State aid. These procedures were found by the lower court to be effective, non-judgmental and non-entangling. There is nothing in any prior decisions of this Court to suggest in the least that that finding was erroneous as applied to institutions of higher education which do not hold religious indoctrination as one of their purposes.

The resulting relationship established here between the State and the private colleges involves no greater entanglement than was inherent in the *Tilton* aid program. Nor does

the Maryland program establish a relationship nearly as pregnant with entanglement potential as the landlord-tenant relationship present in *Hunt v. McNair, supra.* Some continuing relationship and some entanglement is obviously necessary and permissible, but only excessive entanglement is prohibited. In light of the recent decisions of this Court, the lower court was clearly correct in finding the relationship established by the Maryland program to be within constitutionally permissible bounds.[10]

III.

THE APPELLEE INSTITUTIONS SHOULD NOT BE REQUIRED TO REFUND MONIES HERETOFORE AWARDED THEM UNDER THE MARYLAND ACT.

Appellants do not appear to challenge the decision of the lower court declining to order a refund of monies paid in 1971 under the earlier version of the Maryland Act and prior to the initiation of this litigation. See pp. 22-23 of the Jurisdictional Statement. Their argument, rather, is limited to payments made to two institutions in 1974 relative to graduate degree programs and to the disbursements of escrowded funds made last month. Obviously if, as urged here, the lower court's decision on the merits was correct, then the issue of refund fails to present a substantial question.

Even if the lower court should be reversed, no refund would be in order. The first payments in question were made to Western Maryland and Loyola Colleges after the trial of the case below and the entry of the findings of fact. The payments were based solely on graduate degrees awarded and both colleges certified that the funds would be used for non-sectarian purposes and solely in connection with their

[10] The lower court also treated briefly and separately the question of political entanglement (A-21 to A-23). Whether or not this is to be viewed as a separate issue, the lower court was clearly correct in its conclusion and Appellants do not appear to argue otherwise.

graduate programs. This case, as filed, tried and decided, involves the college level programs of the institutions in question and not the graduate level programs. No evidence was introduced and no record was established with respect to graduate level programs. The belated and unsubstantiated request for injunctive relief against these payments was and remains totally without merit.

The second and more recent series of payments involves the funds which the State, during the two year pendency of the proceedings below, withheld from the appellee institutions not under judicial restraint but out of a responsible sense of caution and concern. These funds were paid out only after the lower court's decision in favor of the constitutionality of the Maryland Act and after the denial of Appellants' requests for injunctive relief pending appeal.

The issue of refund here, we submit, is controlled by this Court's decision in *Lemon v. Kurtzman*, 411 U.S. 192 (1973) [*Lemon II*] and the action taken on a stay application in *Robinson v. DiCenso*, 399 U.S. 918 (1970). In *Lemon II* this Court affirmed the refusal of the lower court to block payments which State officials proposed to make *after* the statute had been found unconstitutional but which represented reimbursement for educational services rendered before that decision (in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). Notwithstanding the fact that the aid program there in question had been found unconstitutional prior to the payments, this Court ruled that State officials need not await the confirmation of a conclusive federal court ruling before implementing presumptively constitutional aid programs. As was said there:

> ". . . Until judges say otherwise, state officers — the officers of Pennsylvania — have the power to carry forward the directives of the state legislature. Those officials may, in some circumstances, elect to defer acting until an authoritative judicial pronouncement has

> been secured; but particularly when there are no fixed and clear constitutional precedents, the choice is essentially one of political discretion and one this Court has never conceived as an incident of judicial review." 411 U.S. at 208.

Here the State did defer for a reasonable time and has now elected to act following the favorable judicial pronouncement of a three-judge District Court. There is no reason whatsoever for disturbing that action. This is even more clearly illustrated by this Court's decision in *Robinson v. DiCenso, supra,* to stay the lower court's injunction, thus permitting payments to be made under a Rhode Island statute declared to be unconstitutional by the lower court in a decision which was later affirmed in *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

CONCLUSION

For the reasons stated above, it is respectfully submitted that the questions presented herein are so unsubstantial as not to warrant further argument and that plenary review should not be granted and the lower court's decision should be summarily affirmed.

Respectfully submitted,

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